FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 25 1948
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

79543
Sup. Ct.

OCTOBER TERM, 1947

No. 696

BENJAMIN GUINNESS,

Petitioner,

vs.

THE UNITED STATES

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

ELLSWORTH C. ALVORD,
FLOYD F. TOOMEY,
Counsel for Petitioner.

WILLIAM H. QUEALY,
Of Counsel.

INDEX

	Page
Petition for writ of certiorari	1
Statement	1
Statutes and Regulations Involved	9
Question presented	9
Reasons relied on for the allowance of the writ	9
Brief in support of the petition	12
Opinion below	12
Jurisdiction	12
Statement of facts	12
Statutes and regulations involved	12
Argument	12
Conclusion	20
Appendix:	
Statutes and regulations involved	22

Table of Cases Cited

Commissioner v. *Court Holding Co.*, 324 U. S. 331	10, 14
Commissioner v. *Fisher*, 327 U. S. 512	18
Commissioner v. *Timken*, 141 F. (2d) 625	10, 18
Commissioner v. *Wakefield*, 139 F. (2d) 280	17
Commissioner v. *Young Corporation*, 103 F. (2d) 137	17
Baum v. *Dallman*, — Fed. Supp. — (D.C.U.S. So. Ill.), decided February 24, 1948	9
Beach Petroleum Corp., Ltd., T. C. Memo., Dk. No. 3273, July 26, 1946	10, 19
Dobson v. *Commissioner*, 320 U. S. 489	15
Estate of John H. Acheson, T. C. Memo., Dk. Nos. 2712, et al., November 25, 1944	10, 19
Fairfield Steamship Corp'n. v. *Commissioner*, 157 F. (2d) 321	9, 16
General Utilities & Operating Co. v. *Helvering*, 296 U. S. 200	6, 11
Gregory v. *Helvering*, 293 U. S. 465	14
Herbert G. Hanan, T. C. Memo., Dk. No. 1539, July 7, 1944	10, 19

Page

Henry S. McKee, T. C. Memo., Dk. No. 112400, July 15, 1944 ..... 10, 19
Howell Turpentine Co. v. *Commissioner*, 162 F. (2d) 319 ..... 9, 16
Howard C. Platt Trust, T. C. Memo., Dk. Nos. 2248 et al., June 25, 1945 ..... 10, 19
Paulina duPont Dean, 9 T. C. 256 ..... 10, 19
Transport, Trading & Terminal Corporation, 9 T.C. 247 ..... 10, 19
United States v. *Cummins Distilleries Corporation*, — F. (2d) — (C.C.A. 6th), decided February 6, 1948 .. 9, 16
V. U. Young, 5 T.C. 1251 18

STATUTES CITED

Act of February 13, 1925, Sec. 3(b), as amended by Act of May 22, 1939 12
Revenue Act of 1928, 45 Stat. 791:
Sec. 115(a) and (d); Sec. 101 ..... 8, 9
Judicial Code, Section 138 (Sec. 138, Act of March 3, 1911, 36 Stat. 1136) 11

TEXT CITED

Magill, Roswell, Sales of Corporation Stock or Assets, Columbia Law Review, Vol. 47, No. 5, pp. 707, 713 .. 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 696

BENJAMIN GUINNESS,

Petitioner,

vs.

THE UNITED STATES

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

The above-named petitioner prays that a writ of certiorari issue to review the judgment (R. 53) of the Court of Claims of the United States entered in this cause on December 1, 1947.

Statement

This is an action against the United States to recover an alleged overpayment of federal income taxes for the calendar year 1930. The only remaining issue, to which this petition is directed, relates to the proper treatment for federal income tax purposes of a transaction whereby the partnership of Ladenburg, Thalmann & Company, of which the petitioner was a partner, sold 150,000 shares of stock of Standard Power & Light Corporation.

The petitioner, at all times material herein, was an individual subject of Great Britain, residing in France.

During the calendar year 1929, and for several years prior thereto, he was a partner of Ladenburg, Thalmann & Company, a partnership with its principal office at 25 Broad Street, New York City. His withdrawal as a partner became effective as of December 31, 1929 (R. 22-23).

Ladenburg, Thalmann & Company was in the investment banking business. The partnership had acquired control of 165,000 shares of Standard Power & Light Corporation stock. H. M. Byllesby & Co., also in the investment banking business, owned a similar amount of the stock. By reason of the ownership of this stock, the two investment bankers were able to control the placing of the securities of a large number of public utilities which were owned or controlled by Standard Power & Light Corporation and its subsidiaries (R. 34-35). In order to maintain this control, the stock was placed in escrow with restrictions governing its sale (R. 27).

In the course of the financing of these utilities, there were certain transactions as a result of which the Byllesby interests were threatened by a suit on the part of minority interests. The reorganization of the corporate structure of these companies, which was contemplated in the agreement of December 21, 1929, was designed to eliminate that threat (R. 27; R. 52).

In order to isolate the ownership of the Standard Power & Light Corporation stock from the incidents of changes in the partnership interests, the stock was caused to be transferred to Standard Utilities Corporation, all the stock of which was in turn owned by the partnership (R. 27). Therefore, during the negotiations proceeding the agreement of December 21, 1929, Ladenburg, Thalmann & Company owned all the stock of Standard Utilities Corporation and that corporation, in turn, owned the 165,000 shares of Standard Power & Light Corporation stock which had been acquired by the partnership (R. 28-29).

The stock was registered in a street name and endorsed in blank with stock transfer powers attached (R. 31). It had been deposited with the Chemical Bank & Trust Company, or its predecessor, in escrow (R. 27). The ownership of the stock by Standard Utilities Corporation had never been disclosed. For all practical purposes, the only record thereof was represented by the respective entries on the books of Standard Utilities Corporation and of the partnership (R. 51-52).

As a result of the desire of the Byllesby interests to acquire the Standard Power & Light Corporation stock, there was presented to the partnership an opportunity to sell this stock at a large profit. However, if the stock were sold by Standard Utilities Corporation, that corporation would realize a substantial gain on the sale. This gain would be in turn taxed again when distributed to the partnership. It was planned to distribute 150,000 shares of the stock as a dividend in the event that the sale was to be consummated.

An elaborate agreement, dated December 21, 1929, was entered into whereby the partnership bound itself, upon the fulfillment of certain conditions, to make a sale of the stock for a consideration of $25,000,000.00, represented in part by cash and in part by notes of the purchaser to be secured by the stock as collateral. The stock was to be sold to United States Electric Power Corporation. The conditions involved the adoption of certain amendments to the certificate of Standard Power & Light Corporation and the approval thereof by the other stockholders (R. 27-28).

The partnership did not disclose that the stock was then held by Standard Utilities Corporation. Due to the fact that the partnership owned all the stock of that corporation, the partnership was assured of being in a position to deliver the stock in the event that the sale should be consummated. As will appear from paragraph (7) of the

Special Findings of Fact of the Court of Claims—which is strictly in accord with the stipulation of facts—the partnership unqualifiedly agreed to sell the stock upon the fulfillment of the requisite conditions (R. 27-28). Thus, the partnership did not enter into the agreement as agent of Standard Utilities Corporation.

The parties to the agreement of December 21, 1929, convened at Dover, Delaware, on January 7, 1930, for the purpose of completing the sale. A representative of the depositary was present with the stock certificates and the agreed purchase price represented by a check for $10,000,000.00 and $15,000,000.00 in notes of the purchaser. The transfer agent was likewise present in order to record the transfer of the stock on the records of Standard Power & Light Corporation. Most of the preliminary conditions for the sale were completed that morning. The partnership was thereupon reasonably assured that the transaction would be consummated (R. 31).

On the afternoon of January 7, at a duly convened meeting of the Board of Directors of Standard Utilities Corporation, the following resolutions were adopted:

> "RESOLVED, that Ladenburg, Thalmann & Co., for and on behalf of Standard Utilities Corporation, and without the necessity of disclosing Standard Utilities Corporation as the principal for whom they are acting be and they hereby are authorized on behalf of Standard Utilities Corporation, to negotiate and consummate a sale of Fifteen Thousand (15,000) shares of Common Stock of Standard Power and Light Corporation at the price of One Hundred Fifty Dollars ($150) per share and to cause certificates therefor to be delivered to the purchaser thereof and, upon receipt of the purchase price therefor in cash, to hold the same to the credit of this corporation and subject to the order of its officers;
>
> "RESOLVED, that One Hundred Fifty Thousand (150,000) shares of Common Stock of Standard Power

and Light Corporation be and they hereby are declared to be paid as a dividend upon all the outstanding shares of stock of this Corporation of each class, share and share alike, payable immediately to the holders of record therof."

A "ticket" constituting a bill of sale was delivered to the partnership and 150,000 shares of the stock were transferred on the respective records of Standard Utilities Corporation and the partnership. Since the stock was registered in a street name and endorsed in blank, this effectuated a complete change in ownership. The representative of the partnership at Dover was advised of this action (R. 32-33).

At a meeting held simultaneously, the Board of Directors of Standard Gas & Electric Company approved the prior proceedings of its stockholders and the amendment to the certificate of incorporation of Standard Power & Light Corporation (R. 31). All the conditions for the sale were thereupon fulfilled, with the exception of the filing of the amendment with the Secretary of State of Delaware. Prior to such filing, however, the agreement was still executory.

Thereafter, on the same date, the amendment was filed with the Secretary of State of Delaware. At the direction of the representative of the partnership, the stock was transferred by the transfer agent to the purchaser and the check and notes were delivered to the partnership. Of the total cash received, $2,250,000 was credited to the account of Standard Utilities Corporation in payment for 15,000 shares and the balance of the cash and the notes were retained by the partnership in payment for 150,000 shares (R. 33).

In filing his Federal income tax return for the year 1930, the petitioner reported as a dividend the amount of $4,746,-441.57, representing the value of his interest in the distribution of the 150,000 shares of stock by Standard Utilities

Corporation (R. 34). This was, of course, prior to the decision of this Court in *General Utilities & Operating Company* v. *Helvering*, 296 U. S. 200. The petitioner assumed that the entire value of the distribution was taxable as an ordinary dividend. It subsequently developed that the distribution exceeded the accumulated earnings and profits of Standard Utilities Corporation.

On December 12, 1932, the petitioner filed the first claim for refund. The basis of that claim was that the distribution was taxable as a capital gain to the extent that it exceeded the accumulated earnings and profits of Standard Utilities Corporation plus the cost or basis of the petitioner's stock of that corporation. After a thorough investigation of that claim, the Commissioner of Internal Revenue agreed with the petitioner's contention. However, the Commissioner asserted certain other adjustments as offsets to the claim whereby the amount refundable was reduced to $19,611.28. That amount, with interest, was duly refunded to the petitioner (R. 37).

On August 14, 1933, the petitioner filed a second claim for refund in which he contended that the adjustments made by the Commissioner of Internal Revenue, as offsets to the first claim, were erroneous. Upon a consideration of the second claim, the Commissioner reversed his position with respect to the distribution and sale of the Standard Power & Light Corporation stock. The claim was duly rejected on that amount, R. 38-39). This action was thereupon brought in the Court of Claims.

The case was decided by the Court of Claims on July 7, 1947 (R. 22). Entry of judgment was suspended for a report from a Commissioner of the Court of Claims (R. 40). A motion for new trial was overruled on October 8, 1947 (R. 52). A Supplemental Stipulation was thereupon filed, pursuant to which it was agreed that a recomputation of

the petitioner's federal income tax liability for the calendar year 1930, on the basis of the decision, resulted in a deficiency in federal income taxes due from the petitioner in the amount of $6,511.50. Judgment was entered in accordance with the stipulation on December 1, 1947 (R. 52-53). A second motion for new trial was overruled on March 1, 1948 (R. 53).

The amounts necessary to determine the earnings and profits of Standard Utilities Corporation available for distribution as a taxable dividend under any theory of the case, the petitioner's basis for the stock of that corporation, and the value of the stock of Standard Power & Light Corporation at the time of the distribution, are all set forth in the findings of the Court of Claims (R. 33). The value of the 150,000 shares of the Standard Power & Light stock, distributed and sold on January 7, 1930, was $21,850,000.00.[1] The earnings and profits of Standard Utilities Corporation accumulated after February 28, 1913, exclusive of the transactions involving the Standard Power & Light stock, amounted to only $4,361,964.25 (R. 34). In the decision of the Court of Claims, a *quorum* of that court could not agree on any theory for holding that any distribution in excess of that amount was taxable as an ordinary dividend within the meaning of section 115(a) of the Revenue Act of 1928.

The opinion of Judge Madden, with Judge Jones concurring, held that the transaction must be treated as if the 150,000 shares of dividend stock had been sold for the account of Standard Utilities Corporation and the proceeds distributed to the partnership as a dividend (R. 42-45). On that theory, Standard Utilities Corporation would realize sufficient earnings, as a result of the sale of the stock,

---

[1] Based on $7,750,000 in cash and $15,000,000 face amount in notes having a value of $14,100,000 (R. 33).

together with the accumulated earnings available at the time, in order that the entire value of the distribution would be paid out of earnings and profits accumulated after February 28, 1913. In that event, the entire distribution would be taxable as an ordinary dividend.

This theory of the case was not agreed to by Judge Whitaker and Judge Littleton, the other two members of the Court of Claims who participated in the decision. Both concluded that the declaration of the dividend by Standard Utilities Corporation and the sale of the stock by the partnership should be treated as separate transactions for federal tax purposes (R. 47-48; R. 50). On that theory, the sale of the stock would not give rise to any additional earnings available for distribution by Standard Utilities Corporation as a taxable dividend. However, Judge Whitaker held that, since the dividend stock was presumably purchased by Standard Utilities Corporation out of earnings and profits, and the accumulated earnings and profits as of the date of distribution exceeded the cost of that stock, it was immaterial that the value of the distribution exceeded the earnings and profits accumulated after February 28, 1913. The full value of the distribution was, nevertheless, taxable as a dividend within the meaning of section 115(a) of the Revenue Act of 1928. Therefore, he concurred in the result arrived at by Judges Madden and Jones (R. 48-50).

As a result of the foregoing, judgment was entered in this proceeding pursuant to an opinion by Judges Madden and Jones, which was contrary to the views of the other two members of the Court of Claims who participated in the decision, and an opinion by Judge Whitaker, which was contrary to the views of the other three members of that court. There was no basis for a decsion which was agreed to by any three members of the Court of Claims.

Statutes and Regulations Involved

The pertinent statutes and regulations will be found in an Appendix.

Question Presented

Whether the Court of Claims erred as a matter of law in deciding that petitioner's entire distributive share of the proceeds from the sale of 150,000 shares of stock of Standard Power & Light Corporation was taxable as an ordinary dividend within the meaning of section 115(a) of the Revenue Act of 1928.

Reasons Relied on for the Allowance of the Writ

I. The opinion of Judge Madden, concurred in by Judge Jones, with respect to the legal effect of the distribution and sale of the Standard Power & Light Corporation stock, is in conflict with other decisions of the courts of the United States and of the Tax Court. Some of these decisions are:

Howell Turpentine Company v. *Commissioner*, 162 F. (2d) 319 (C.C.A. 5th);

United States v. *Cummins Distilleries Corporation*, — F. (2d) — (C.C.A. 6th), decided February 6, 1948;

Baum v. *Dallman*, — F. Supp. — (Dist. Ct., So. Dist., Ill.) decided February 24, 1948;

See also: *Fairfield Steamship Corporation* v. *Commissioner*, 157 F. (2d) 321 (C.C.A. 2nd).

The opinion of Judge Madden on this question is likewise in conflict with the opinion of Judge Whitaker and the opinion of Judge Littleton, who participated in the decision below.

II. The construction of section 115(a) of the Revenue Act of 1928, as set forth in the opinion of Judge Whitaker, is in conflict with other decisions of the courts of the

United States and of the Tax Court. Some of these decisions are:

Commissioner v. *Timken*, 141 F. (2d) 625 (C.C.A. 6th);
V. U. Young, 5 T.C. 1251;
Transport, Trading & Terminal Corporation, 9 T.C. 247 (on appeal C.C.A. 2nd);
Paulina duPont Dean, 9 T.C. 256 (on appeal C.C.A. 3rd);
Estate of John H. Acheson, T.C. Memo., Dk. Nos. 2712, et al., November 25, 1944;
Howard C. Platt Trust, T.C. Memo., Dk. Nos. 2248, et al., June 25, 1945;
Herbert G. Hanan, T.C. Memo., Dk. No. 1539, July 7, 1944;
Henry S. McKee, T.C. Memo., Dk. No. 112400, July 15, 1944;
Beach Petroleum Corp., Ltd., T.C. Memo., Dk. No. 3273, July 26, 1946.

The opinion of Judge Whitaker on this question is likewise in conflict with the opinion of Judge Madden, concurred in by Judge Jones, and the opinion of Judge Littleton, who participated in the decision below.

III. The questions involved in the opinions of both Judge Madden and of Judge Whitaker are important in the administration of the Internal Revenue laws and should be passed upon by this Court.

The opinion of Judge Madden represents an unwarranted extension of the decision of this Court in *Commissioner* v. *Court Holding Company*, 324 U.S. 331, which the Commissioner of Internal Revenue is presently urging the lower courts to adopt. The decision of the Court of Claims in this proceeding (and of only two judges of that court)

is in conflict with other decisions. The question warrants clarification by this Court.[2]

The proper construction of section 115(a), involving the determination of the earnings and profits of a corporation available for distribution as a taxable dividend and the effect of a distribution of property in kind, is even more important in the administration of the Internal Revenue laws. The Commissioner of Internal Revenue is seeking to overrule the decision of this Court in *General Utilities & Operating Company* v. *Helvering*, 296 U. S. 200. The fact that, pending the consideration of this question by the court below, there have been numerous decisions on the same question in the Tax Court, is ample evidence of the extent to which this issue is presently in controversy.

IV. The question whether there exists a *quorum* of the judges of the Court of Claims, as required for a decision pursuant to section 138 of the Judicial Code (Sec. 138, Act of March 3, 1911, 36 Stat. 1136), under the circumstances of this case, should be decided by the Supreme Court for the guidance of that court.

Wherefore, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

ELLSWORTH C. ALVORD,
FLOYD F. TOOMEY,
1200 - 18th Street, N. W.,
Washington 6, D. C.,
Counsel for Petitioner.

Of Counsel:
WILLIAM H. QUEALY,
208 South LaSalle St.,
Chicago 4, Illinois.

---

[2] Magill, Roswell, Sales of Corporate Stock or Assets, *Columbia Law Review*, Vol. 47, No. 5, pp. 707, 713.

BRIEF IN SUPPORT OF THE PETITION

Opinion Below

The opinion of the Court of Claims is reported at 119 F. Supp. 72.

Jurisdiction

The judgment of the Court of Claims was entered on December 1, 1947. The time for filing this petition was extended to March 31, 1948. The jurisdiction of this Court is invoked under section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Statement of Facts

A statement of the facts and question involved will be found in the petition.

Statutes and Regulations Involved

The pertinent statutes and regulations will be found in an Appendix.

ARGUMENT

The Court of Claims erred as a matter of law in holding that the petitioner's entire distributive share of the proceeds from the sale of 150,000 shares of stock of Standard Power & Light Corporation was taxable as an ordinary dividend within the meaning of Section 115(a) of the Revenue Act of 1928.

I. *With Respect to the Issues Involved, the Decision of the Court of Claims Is Not Based Upon a Decision By a Quorum of the Court of Claims.*

On January 7, 1930, Standard Utilities Corporation made a distribution in kind consisting of 150,000 shares of Stand-

ard Power & Light Corporation stock for the purpose of enabling its stockholders to make a sale thereof. Thereafter on the same day, there were sold for the account of Standard Utilities Corporation an additional 15,000 shares of the stock. No part of the distribution was attributable to an increase in value of property accrued before March 1, 1913.

A *quorum* of the Court of Claims, consisting of Judge Madden, with Judge Jones concurring, and of Judge Littleton, concluded that the distribution was taxable as a dividend only to the extent that there were earnings and profits of Standard Utilities Corporation accumulated after February 28, 1913. Judge Whitaker alone failed to concur in this respect. By reason of this decision, it then became necessary for the Court of Claims to decide whether any additional earnings and profits were realized as a result of the distribution and sale of the Standard Power & Light stock.

Judge Madden, with Judge Jones concurring, held that the distribution of the dividend stock by Standard Utilities Corporation and the sale of that stock by the partnership should be disregarded, as separate transactions, for federal tax purposes. The transactions should thus be treated as a sale of the stock by Standard Utilities Corporation and a distribution of the proceeds to the partnership. The earnings and profits of Standard Utilities Corporation would be increased by the gain realized on the sale. There would thus be additional earnings and profits which would exceed the amount of the distribution and the entire distribution would be taxable under section 115(a) of the Revenue Act of 1928.

Judge Whitaker and Judge Littleton, each in separate opinions, disagreed with that theory of the case. Therefore, there was no determination by a *quorum* of the judges

of the Court of Claims that any additional earnings and profits were realized as a result of the distribution and sale of the dividend stock. In the absence of such determination, the distribution was only taxable, in the opinion of Judges Madden, Jones and Littleton, to the extent that there were accumulated earnings and profits, *i.e.*, $4,361,964.25. The result of the decision, as a whole, was contrary to the intendment of section 138 of the Judicial Code.

II. *The Opinion of Judge Madden with Respect to the Legal Effect of the Transactions Involving the Standard Power & Light Corporation Stock Is Based Upon an Erroneous Interpretation of the Supreme Court's Decision in the Court Holding Company Case.*

Judge Madden held that the sale of the 150,000 shares of Standard Power & Light Corporation stock must be treated as a sale by Standard Utilities Corporation for federal tax purposes. His opinion was based upon the proposition that the intervening dividend *must be disregarded* for tax purposes. It is stated that this is required by this Court's decision in *Commissioner* v. *Court Holding Company* (324 U. S. 331), which reversed the decision of the Circuit Court of Appeals for the Fifth Circuit (143 F. (2d) 823) and affirmed the decision of the Tax Court (2 T. C. 531).

It has always been recognized that taxpayers have the right to shape their transactions in such a manner as to minimize the resulting federal tax liability. This right was reaffirmed in *Gregory* v. *Helvering*, 293 U. S. 465. In that case, however, the taxpayer sought to bring an otherwise taxable transaction within the non-recognition of gain provisions of section 112 of the Revenue Act of 1928. This Court held that in order to qualify within those provisions, there must be a real corporate reorganization having some business purpose. In the absence of such, the Court held

that the separate steps adopted by the taxpayer should be disregarded. The transaction did not meet the requirements of a "reorganization".

Basically, the question is whether this Court's decision in the *Court Holding Company* case, *supra*, follows the line of cases exemplified by *Gregory* v. *Helvering, supra*, or whether that decision follows the line of cases exemplified by *Dobson* v. *Commissioner*, 320 U. S. 489. In the present case, Judge Madden in effect held that the *Court Holding Company* case, *supra*, followed the line of *Gregory* v. *Helvering, supra*. However, there is a fundamental distinction in that we are not concerned with any non-recognition of gain provisions of the revenue laws. The parties adopted a course of action which involved (1) a taxable corporate distribution and (2) a taxable sale of the property received by the shareholders pursuant to that distribution. Neither transaction qualified as a non-taxable transaction under the revenue laws. Thus, we contend that it is solely a question whether there was, in fact, a distribution by the corporation followed by the sale of the property by the shareholders, or whether there was, in fact, a sale of the property by the corporation followed by a distribution of the proceeds to the shareholders. It was stipulated in this case that the sale of the dividend stock was, in fact, contracted for and consummated by the stockholders.

In the *Court Holding Company* case, *supra*, the Tax Court found that there was an oral agreement to sell the property entered into on behalf of the corporation, and that the sale was in reality made pursuant to that agreement. Therefore, the profit resulting from the sale was income of the corporation. The decision was reversed by the Circuit Court of Appeals for the Fifth Circuit, with Judge Hutcheson dissenting. In reversing, the majority held that the corporation had the right to, and did, refuse to complete

the sale. Therefore, the corporation was not taxable on the resulting gain. Judge Hutcheson, dissenting, agreed that this might have been done. However, he concluded that the Tax Court had found, as a fact, that this was not done. Therefore, under the rule of *Dobson* v. *Commissioner, supra,* he was of the opinion that the Circuit Court was bound by that finding. The Supreme Court reversed the decision of the majority and affirmed the decision of the Tax Court *on that basis.* It is thus our position that the decision in the *Court Holding Company* case, *supra,* should be interpreted as turning upon a question of fact, with respect to which the initial decision of the Tax Court was controlling.

This interpretation of the decision in the *Court Holding Company* case, *supra,* has generally been accepted in the subsequent cases in which the question has arisen, as well as by two of the judges of the Court of Claims who participated in the decision below. Some of those cases are:

Howell Turpentine Company v. *Commissioner,* 162 F. (2d) 319 (C. C. A. 5th);

United States v. *Cummins Distilleries Corporation,* — F. (2d) — (C. C. A. 6th), decided February 6, 1948;

Baum v. *Dallman,* —F. Supp. — (Dist. Ct., So. Dist., Ill.) decided February 24, 1948;

See also: *Fairfield Steamship Corporation* v. *Commissioner,* 157 F. (2d) 321 (C. C. A. 2nd).

The correctness of this view is best exemplified in *Howell Turpentine Company* v. *Commissioner, supra.* A majority of the Tax Court there were of the opinion that the *Court Holding Company* case, *supra,* required a holding that a sale, which had in fact been made by the stockholders, should be attributed to the corporation. This was reversed by the Circuit Court of Appeals for the Fifth Circuit on the grounds that the decision of the majority of the Tax Court

was erroneous, as a matter of law, in its interpretation of the *Court Holding Company* case, *supra.* In reversing, Circuit Judge Hutcheson, whose dissent had been sustained in the *Court Holding Company* case, *supra,* was in agreement with the Circuit Court's decision in the *Howell Turpentine Company* case, *supra.*

III. *The Concurring Opinion of Judge Whitaker Is Based Upon an Erroneous Interpretation of Section 115(a) of the Revenue Act of 1928 and of Regulations 74, Article 627.*

The plaintiff below and the Government stipulated the facts upon the basis of which the Court of Claims might determine the amount of the distribution, whether in stock or the proceeds from the sale thereof, which was taxable as a dividend upon section 115(a) of the Revenue Act of 1928. Both sides agreed that the amount taxable as a dividend could not exceed the earnings and profits accumulated after February 28, 1913. The Government, in effect, conceded that if the distribution in kind was recognized for tax purposes, the amount taxable as a dividend was limited to the earnings and profits accumulated from other sources. This was the basis for the Commissioner's original determination allowing a partial refund. However, in a concurring opinion Judge Whitaker alone adopts a different view. For his opinion, he relies upon Article 627 of Regulations 74 and the cases of *Commissioner* v. *Wakefield,* 139 F. (2d) 280 (C. C. A. 6th) and *Commissioner* v. *Young Corporation,* 103 F. (2d) 137 (C. C. A. 3rd).

Article 627 of Regulations 74 refers to a rule of valuation rather than to the taxability of the distribution. Obviously, if there were no earnings and profits available for distribution as a taxable dividend, a dividend in kind would be wholly non-taxable under section 115(a) of the Revenue Act

of 1928. The dividend is includible in gross income, or taxable under another provision of the revenue laws in the case of a capital gain, to the extent of the fair market value of the property received.

In *Commissioner* v. *Wakefield, supra,* a corporation distributed stock of another corporation as a dividend in kind. The recipients treated the distribution as a return of capital to the extent that it exceeded the earnings and profits of the distributing corporation. The Circuit Court of Appeals for the Sixth Circuit held that the full amount of the distribution was taxable as a dividend on the theory that the stock distributed was purchased out of earnings and profits. The Revenue Act of 1936 was controlling. The court relied on section 115(j). There was no corresponding provision in the Revenue Act of 1928.

There have been numerous cases involving distributions in kind decided subsequent to the *Wakefield* case, *supra.* The contention that the taxability of a distribution of property is governed by whether the property was originally purchased out of earnings has been uniformly rejected by the courts. This contention has never even been asserted by the Commissioner here. The rule, uniformly followed by the courts, is that a distribution in kind is taxable as a dividend only to the extent that there were statutory earnings and profits available at the time of the distribution. In order to eliminate any question, the Congress has attempted to define more specifically the phrase "earnings or profits". (See Internal Revenue Code, Sec. 115(l) and(m).) This was held merely to be declaratory of existing law. (*Commissioner* v. *Fisher,* 327 U. S. 512) The opinion of Judge Whitaker, if corect, would have required a different decision in substantially all of the cases dealing with distributions in kind. Some of those cases are:

Commissioner v. *Timken,* 141 F. (2d) 625 (C. C. A. 6th);

V. U. Young, 5 T. C. 1251;

Transport, Trading & Terminal Corporation, 9 T. C. 247 (on appeal C. C. A. 2nd);

Paulina duPont Dean, 9 T. C. 256 (on appeal C. C. A. 3rd);

Estate of John H. Acheson, T. C. Memo., Dk. Nos. 2712, et al., November 25, 1944;

Howard C. Platt Trust, T. C. Memo., Dk. Nos. 2248, et al., June 25, 1945;

Herbert G. Hanan, T. C. Memo., Dk. No. 1539, July 7, 1944;

Henry S. McKee, T. C. Memo., Dk. No. 112400, July 15, 1944;

Beach Petroleum Corp., Ltd., T. C. Memo., Dk. No. 3273, July 26, 1946.

The principles which are applicable here were recently restated by the Tax Court in *Paulina duPont Dean, supra*, promulgated August 29, 1947. The court there said:

> "To constitute a dividend there must be a distribution of earnings and profits. *Palmer v. Commissioner*, 302 U. S. 63. The earnings and profits of a corporation, the distribution of which results in a taxable dividend, are a statutory concept. They are not to be determined exclusively by reference to corporate accounting standards. *John T. Wilson*, 31 B. T. A. 1022; *Susan T. Freshman*, 33 B. T. A. 394. We have consistently applied the rule that a distribution in kind of stock which had appreciated in value did not result in taxable income to the corporation. Estate of *H. H. Timken*, 47 B. T. A. 494; affd., 141 Fed. (2d) 625; *National Carbon Co.*, 2 T. C. 57; *V. U. Young*, 5 T. C. 1251; cf. *R. D. Merrill Co.*, 4 T. C. 955. In the latter case we held that earnings and profits could not be decreased by the depreciation in value of securities. In *La Belle Iron Works v. United States*, 256 U. S. 377, it was held that the appreciated value of corporate property could not be treated as part of the corporate surplus and profits for the purpose of increasing its

invested capital. In *V. U. Young, supra,* respondent, in connection with the distribution of Theatrical Managers, Inc., stock by Gary Theatre Co. to its stockholders, made the same contention, at least in principle, as that made here. We rejected that theory there and held that the distribution in kind could not be and was not a taxable dividend except to the extent of the corporate earnings and profits, when distributed, without including the increase in value of the corporate assets. * * *

"Nor do we find any merit in the respondent's alternative positions. He argues that certain of the securities distributed in kind were purchased prior to the taxable year at a time when Nemours had earnings and profits accumulated after March 1, 1913, in amounts in excess of the cost of such shares. A similar argument was made by respondent in the recent case of *Jane Easton Bradley,* 9 T. C. 115. We there held that such fact is immaterial and not determinative. Only to the extent that earnings and profits are available for distribution in the taxable year—and determined without including any increment in the value of the distributed assets—can there be a taxable dividend. *V. U. Young, supra; Jane Easton Bradley, supra; Estate of H. H. Timken, supra; R. D. Merrill Co., supra.* * * *" (p. 265).

There can be no question but that the opinion of Judge Whitaker, *with which none of the other judges agreed,* is directly in conflict with the principles thus enunciated.

Conclusion

The decision of the Court of Claims with respect to the transactions involving the Standard Power & Light Corporation stock is erroneous, as a matter of law, in that the ultimate decision is based upon separate opinions by Judge Madden (concurred in by Judge Jones) and by Judge Whitaker. In each opinion, there was involved a separate and distinct

issue upon which a decision was necessary in order that the ultimate decision of the Court of Claims might be sustained. Neither decision with respect to such issues was concurred in by a *quorum* of the Court of Claims. Furthermore, the separate opinions of Judge Madden and of Judge Whitaker on those issues are likewise erroneous as a matter of law. The dissenting opinion of Judge Littleton represents the correct view on those issues.

Respectfully submitted,

ELLSWORTH C. ALVORD,
FLOYD F. TOOMEY,
1200—18th Street, N. W.,
Washington 6, D. C.,
Counsel for Petitioner.

Of Counsel:
WILLIAM H. QUEALY,
208 South LaSalle St.,
Chicago 4, Illinois.

APPENDIX

Statutes and Regulations Involved

Revenue Act of 1928, 45 Stat. 791:

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of a dividend.*—The term "dividend" when used in this title (except in section 203(a)(4) and section 208(c)(1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913.

* * * * * * *

(d) *Other distributions from capital.*—If any distribution (not in partial or complete liquidation) made by a corporation to its shareholders is not out of increase in value of property accrued before March 1, 1913, and is not out of earnings or profits, then the amount of such distribution shall be applied against and reduce the basis of the stock provided in section 113, and if in excess of such basis, such excess shall be taxable in the same manner as a gain from the sale or exchange of property. The provisions of this subsection shall also apply to distributions from depletion reserves based on the discovery value of mines (p. 822).

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and

the total tax shall be this amount plus 12½ per centum of the capital net gain (p. 811).

Act of March 3, 1911, 36 Stat. 1087:

SEC. 138. The Court of Claims shall hold one annual session at the city of Washington, beginning on the first Monday in December and continuing as long as may be necessary for the prompt disposition of the business of the court. Any three of the judges of said court shall constitute a quorum, and may hold a court for the transaction of business: *Provided,* That the concurrence of three judges shall be necessary to the decision of any case (p. 1136).

Treasury Regulations 74 (December 1, 1931):

ART. 627. *Dividends paid in property.*—Dividends paid in securities or other property (other than its own stock) in which the earnings of a corporation have been invested, are income to the recipients to the amount of the market value of such property when receivable by the shareholders. (See, however, section 112 (h) and article 576.) Where a corporation declares a dividend payable in stock of another corporation, setting aside the stock to be so distributed and notifying the shareholders of its action, the income arising to the recipients of such stock is its market value at the time the dividend becomes payable. (See article 333.) Scrip dividends are subject to tax in the year in which the warrants are issued.